No. 12232

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SCOTT PUBLISHING COMPANY, a Corporation,

Appellant,

vs.

RALPH RODGERS, Trustee in Bankruptcy of Mid-Columbia Publishers, Inc., Bankrupt,

Appellee.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLANT

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STATEMENT AS TO JURISDICTION

This is an appeal to this court from an Order and Judgment of the United States District Court for the Eastern District of Washington, Southern Division, sitting as a bankruptcy court (R. 5). The Order and Judgment of that court is one affirming an Order of the Referee in Bankruptcy for the District upon review (R. 3-4). The jurisdiction of the District Court accordingly arises out of a bankruptcy matter, of which such court has jurisdiction by reason of the provisions of The National Bankruptcy Act, particularly Section 2 thereof, 11 *U.S.C.A.* 11. This court has appellate jurisdiction by reasons of Sections 24 and 25 of the Act. 11 *U.S.C.A.* 47, 48. The Order appealed from was filed on February 21, 1955, and Notice of Appeal was filed on March 17, 1955, and a Bond for Costs on Appeal was filed on the same date (R. 5, 6-11).

STATEMENT OF THE CASE

Mid-Columbia Publishers, Inc., formerly Kennewick Printing Co., Inc., was a corporation organized under the laws of the State of Washington, engaged in the business of publishing a weekly newspaper in Kennewick, Washington, in 1949 (R. 13, 24-25). At the same time, the Scott Publishing Company was also engaged in the publishing of a daily newspaper at Kennewick, Washington. Mid-Columbia was engaged in the purchase of the equipment and business of the newspaper which they were

publishing from one Ralph Reed, who had originally sold the newspaper and its equipment under a contract of conditional sale (R. 23-24). Mid-Columbia was in desperate financial straights in June of 1949, and was unable to make the contract payment due on June 1, 1949, and was unable to meet the pay roll due the employees (R. 25). On June 11, 1949, a meeting of those financially interested in the Mid-Columbia Publishers was held, and Reed attended the meeting. Reed claims that he came away from the meeting without committing himself to the people there in any way, and so convinced of his insecurity that he effected a repossession of his newspaper plant and equipment by advising those in possession thereof of the repossession that same evening (R. 26). Other parties interested in the matter denied that Reed made this repossession, and, in fact, testified that he agreed to extend the time for the making of the payment (R. 25-27). In any event, later the same evening, Reed approached Glenn C. Lee,, one of the officers of Scott Publishing Company, representing that he had repossessed his property, and offering to sell it to Lee and the Scott Publishing Company. Lee agreed to purchase the property and an instrument was drawn up that evening covering the transaction. Scott Publishing Company agreed to pay $15,-000.00 for the property of the weekly newspaper, and made a down payment at that time (R. 25-28).

The following day representatives of the Scott Publishing Company physically took possession of the plant, which included among other properties, a certain Model 34 Mergenthaler Linotype machine, which is now involved in this litigation (R. 29, 14).

It will be seen from a recital of the foregoing facts that there was a conflict among the people concerned as to what occurred on the evening of June 11, 1949. The Scott Publishing Company either purchased a newspaper plant and business for $15,000.00, which was then owned by the seller, Reed, without any interest remaining in the Mid-Columbia Publishers, or Scott Publishing Company simply bought a contract which was not yet in default by reason of the fact that Reed had extended the time for payment (R. 29). On the date to which payment was claimed to have been extended, Mid-Columbia tendered the contract payment to Scott Publishing Company; it declined to accept it (R. 29).

Thereafter the Mid-Columbia Publishers were adjudicated bankrupt and one Ernest Crutcher was appointed Trustee for the bankrupt corporation. His successor, Ralph Rodgers, is the appellee in this court. The Trustee, Crutcher, in due course commenced an action in the Superior Court of the State of Washington in and for Franklin County against the Scott Publishing Company, alleging that it had wrongfully converted the assets of the

bankrupt corporation (R. 13). This action came on for trial before a jury in Franklin County, Washington, and among other properties which were the subject matter of that litigation, was the Model 34 Mergenthaler Linotype machine previously mentioned (R. 14). This machine had been purchased by the Kennewick Printing Company from the Mergenthaler Linotype Company, which held a mortgage upon the equipment to secure the payment of the balance of the purchase price (R. 14). It is conceded and stipulated between the parties to that litigation that there was a balance due upon this mortgage to the Mergenthaler Company in the sum of $8,550.00 at the time of the alleged conversion of the machine (R. 14). It was found by the jury that the Mergenthaler machine had a market value of approximately $14,000.00 (R. 15). During the course of the trial in Franklin County Superior Court, the Trustee in bankruptcy contended that if this property was found to have been converted, he was entitled to recover from the Scott Publishing Company the market value of the machine, without any deduction therefrom for the amount of mortgage indebtedness due. The Scott Publishing Company, on the other hand, contended that if the property was found to have been converted, it could only be held liable for the difference between the market value and the sum of $8,550.00 due upon the valid and existing mortgage indebtedness to the Mergenthaler Company. During the course of the

trial, the trial judge, the Honorable Richard B. Ott, now a Judge of the Supreme Court of the State of Washington, ruled that if the Scott Publishing Company was to be held liable with respect to the Mergenthaler machine, it could only be held liable for the difference between the market value and the mortgage indebtedness due, and he so instructed the jury (R. 14, 41). It thus became unnecessary for Scott Publishing Company to offer evidence to establish that it had, in fact, assumed and agreed to pay the mortgage indebtedness to Mergenthaler, and that it was doing so. The jury returned a verdict against the Scott Publishing Company finding it had converted the property, and among other items of recovery allowed a sum representing the difference between the value of the linotype machine and the mortgage indebtedness due thereon. Judgment was entered and both parties appealed. The Trustee in bankruptcy cross-appealed on the grounds that the trial court had committed error in permitting him to recover only the difference between the market value and the indebtedness due upon the Mergenthaler machine. In other words, he cross-appealed to have the amount of $8,550.00 added to the amount of his recovery (R. 15). The appeal was heard by the Supreme Court of the State of Washington which handed down an opinion affirming the Judgment against the Scott Publishing Company and sustaining the cross-appeal of the Trustee, and thus adding to the amount of his recovery the sum of

$8,550.00 (R. 15-16). A petition for rehearing was denied and Judgment was entered upon the remittitur of the Supreme Court; the Scott Publishing Company then paid the entire Judgment, including the sum of $8,550.00, which had been added to the recovery (R. 16).

Thereupon, Scott Publishing Company, as petitioner, filed a petition in these bankruptcy proceedings. then pending before the Referee, for the disbursement to it of the $8,550.00 that it had been required to pay to the Trustee, alleging that the Trustee and the bankrupt estate was being unjustly enriched to that extent, since the Scott Publishing Company had assumed and agreed to pay the mortgage to Mergenthaler and was, in fact, making the payments thereon, and intended to make all payments thereon. The Scott Publishing Company further pointed out that it was being unfairly compelled to make double payment of the balance of the mortgage indebtedness, since it was compelled to pay the sum to the Mergenthaler Company upon its mortgage as well as to the Trustee in Bankruptcy who was thereby unjustly enriched, since the bankrupt estate had not assumed and was under no obligation to pay the mortgage indebtedness itself (R.16-17). A motion was made to dismiss the petition by the Trustee and the Trustee also answered the petition, generally alleging that the proceedings in the State court was *res adjudicata* as to such a petition. A reply was made to the answer of the Trustee, and the

matter was tried before the Honorable Michael J. Kerley, Referee in Bankruptcy of the District Court (R. 17).

By his Findings, Conclusion, and Order, the Referee held that the State court proceedings did constitute a final adjudication of the rights of the petitioner and were *res adjudicata* of the matters contained in its petition; that its petition constituted a collateral attack upon a valid judgment of the state court; that petitioner should be barred from equitable relief by reason of having converted the equipment; and that its petition should be dismissed (R. 43-49). This action of the Referee was duly reviewed by the United States District Court, Honorable William J. Lindberg, Judge, who approved and affirmed the Findings, Conclusions, and Order of the Referee. The District Judge, in his memorandum, stated generally that he felt that the doctrine of collateral estoppel by judgment, an application of the rule of *res adjudicata,* should be controlling in the case (R. 50-51). The District Court entered an Order approving and affirming the Referee under date of February 19, 1955, and the Scott Publishing Company has appealed to this Court (R. 51-52; 5-6).

The facts in the case are not disputed but have been stipulated by and between the parties pursuant to Rule 76 of the Federal Rules of Civil Procedure, and the foregoing statement with some additional necessary back-

ground, is a statement of facts intended to reflect the agreed statement contained in the record (R. 13-22).

SPECIFICATIONS OF ERROR

1. The District Court erred in confirming and approving by order the entire Findings of Fact, Conclusions of Law, and Order of the Referee on the basis that collateral estoppel by judgment controlled the case (R. 50-53).

2. The Referee erred in concluding, as a matter of law, that the state court judgments were a final and conclusive adjudication of the right of the Trustee to recover (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

3. The Referee erred in concluding, as a matter of law, that the matters and things here presented could have been litigated in the State court proceedings, and hence are barred (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

4. The Referee erred in concluding, as a matter of law, that these proceedings constitute a collateral attack on a valid State court judgment (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

5. The Referee erred in concluding, as a matter of law, that the appellant did not come into court with clean hands, and is barred from equitable relief (such conclusion

being necessarily approved by the District Court, as set forth in Specification 1 above).

6. The Referee erred in dismissing the petition of Scott Publishing Company (such conclusion being necessarily approved by the District Court, as set forth in Specification 1 above).

ARGUMENT OF CASE

Summary of Argument

The legal problems involved upon this appeal are set forth in the Agreed Statement of the Case, as follows:

> "1. Is the Scott Publishing Company, petitioner, entitled to restitution of the sum of $8,550.00 from the bankrupt estate on the grounds that the bankrupt estate has been unjusly enriched to that extent at the expense of the petitioner?
>
> "2. Is the Scott Publishing Company, by reason of its conversion of the Mergenthaler linotype, in a position to obtain equitable relief in these proceedings?
>
> "3. Is the judgment of the Superior Court of Franklin County, Washington, as modified on appeal by the Supreme Court of the State of Washington, res adjudicata of the right of the petitioner to recover any sums from the Trustee by these proceedings?
>
> "4. Do these proceedings involve matters which could and should have been adjudicated and determined by the State court proceedings?
>
> "5. Do these proceedings constitute an attempted collateral attack upon a valid and subsisting judgment of the Superior and Supreme Courts of the State of Washington? (R. 19).

The argument of appellant may be summarized by stating that it is the position of the appellant upon this appeal with respect to each of the points involved as follows:

"1. The petitioner, Scott Publishing Company, is entitled to restitution of the sum of $8,550.00 from the bankrupt estate on the grounds that the bankrupt estate has been unjustly enriched to that extent at the expense of he petitioner.

"2. The Scott Publishing Company is not barred from obtaining equitable relief in these proceedings.

"3. The judgments of the courts of the State of Washington are not res adjudicata of the right of Petitioner to restitution from the Trustee for unjust enrichment of the bankrupt estate.

"4. These proceedings involve matters which were not, could not and should not have been adjudicated and determined by the proceedings in the state court.

"5. These proceedings are not a collateral attack on a valid judgment of the courts of the State of Washington, but a separate equitable proceeding to obtain restitution by reason of unjust enrichment of the bankrupt estate."

1. RIGHT OF PETITIONER TO RESTITUTION

It is manifest that a situation has arisen through no fault of the appellant which has resulted on the one hand, in the bankrupt estate obtaining $8,550.00 to which it is not entitled, and on the other hand, the appellant twice paying an obligation of $8,550.00 to its detriment. We

have here a clear case of unjust enrichment with the lower courts ruling that they are without right to remedy the injustice because of a belief that the restrictive doctrine of *res adjudicata* renders them powerless to remedy the situation.

It seems clear that there has been an unjust enrichment. Admittedly, the bankrupt estate did not assume, pay, or agree to pay the sum of $8,550.00 that was due under the valid mortgage upon the Mergenthaler linotype machine. It is agreed that evidence was offered before the Referee that the Scott Publishing Company had assumed and agreed to pay the mortgage indebtedness and had, in fact, reduced it to the sum of $3,150.00 at the time of the hearing before the Referee (R. 17). The Trustee in Bankruptcy did not dispute and does not dispute that this is the fact, but merely offered evidence that knowledge that it had assumed and agreed to pay the mortgage indebtedness and was paying same was possessed by Scott Publishing company at the jury trial of the conversion action but evidence to that effect was not offered (R. 17). Since there is no dispute but what the appellant has assumed, agreed to pay and has paid the mortgage indebtedness, and since it is agreed that it has also paid the sum of $8,550.00 to the Trustee in satisfaction of the judgment, it is thus clear that an unjust enrichment has occurred and a double payment has been made by the appellant.

No matter whether the petition herein be termed an action for money received, or an action based upon quasi contract, or an action for restitution by reason of unjust enrichment, or whether it be legal or equitable, the general principles announced in the decisions clearly indicate that under the factual situation that here exists the petition is well founded and should be granted, and the funds restored to the petitioner. An excellent statement of the principles involved is found in 77 *C.J.S., Restitution*, Page 32, as follows:

> "Restitution, in legal nomenclature, is an equitable principle, and is founded on the equitable maxim that he who seeks equity must do equity, and one of the grounds on which the doctrine is based is that when one person confers a benefit on another through mistake, whether of fact or law, the other is liable to make restitution. It is sometimes considered to be the modern designation for the older doctrine of quasi contracts.
>
> "A cause of action for restitution is a type of the broader cause of action for money had and received, and generally the object to be attained in proceedings for restitution is the prevention of unjust enrichment of defendant and the securing for plaintiff of that to which he is justly and in good conscience entitled. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled. It has been said that restitution, properly speaking, is made only to a defendant whose money or property has been taken from him by the erroneous order of a court, and it is not available to third parties.

"It is not necessary, in order to create an obligation to make restitution, that the party unjustly enriched should have been guilty of any tortious or fraudulent act; the question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled? In such cases the simple, but comprehensive, question is whether the circumstances are such that equitably defendant should restore to plaintiff what he has received."

Mr. Justice White, speaking for the Supreme Court in *Rankin v. Emigh*, S. Ct. 218 U. S. 27, 54 L. Ed. 915, 30 S. Ct. 672, said:

"This court, without in any way questioning that the state court was correct in holding that the contract of guaranty was *ultra vires* of the national bank act, nevertheless affirmed the judgment below. Reviewing and commenting upon the rulings in *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; and *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 136, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, it was held although restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged by force of the illegal contract, yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

At a later date, Mr. Justice Stone, speaking for the same court in *Stone v. White*, 301 U. S. 522, 81 L. ed. 1265,

57 S. Ct. 851, in connection with a tax recovery action, stated:

> "The action, brought to recover a tax erroneously paid, although an action at law is equitable in its function. It is the lineal successor of the common count in debitatus assupsit for money had and received. Originally an action for the recovery of debt, favored because more convenient and flexible than the common law action of debt, it has been gradually expanded as a medium for recovery upon every form of quasi-contractual obligation in which the duty to pay money is imposed by law, independently of contract, express or implied in fact. Ames, The History of Assumpsit, 2 Harvard L. Rev. 53; Woodward, Quasi-Contracts, §2.
>
> "Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in *Moses v. Macferlan,* 2 Burr. 1005, 97 Eng. Reprint, 676 (K. B. 1760), have long been recognized in this Court. See *Nash v. Towne,* 5 Wall. 689, 702, 18 L. ed. 527, 530; *Gaines v. Miller,* 111 U. S. 395, 397, 28 L. ed. 466, 467, 4 S. Ct. 426; *Atlantic Coast Line R. Co. v. Florida,* 295 U. S. 301, 309, 79 L. ed. 1451, 1457, 55 St. Ct. 713."

The doctrine has been uniformly announced and applied by the various Circuit Courts. In this Circuit in *Lipman, Wolfe & Co. v. Phoenix Assur. Co. Limited,* 258 F. 544, Judge Gilbert, speaking for this court, cited with approval the authorities, stating:

> "The first question which arises is whether the com-

plaint states a cause of action. In *Carey v. Curtis*, 3 How. 236, 247 (11 L. Ed. 576), the court said:

" 'The action of assumpsit for money had and received, it is said by Lord Mansfield, Burr, 1012, *Moses v. MacFarlen,* will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton v. Rastall*, 2 T. R. 360, " "that this action has been of late years extended on the principle of its being considered like a bill in equity, and therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity." ' " These are the general grounds of the action as given from high authority.'

"In *Bither v. Packard*, 115 Me. 306, 312, 98 Atl. 929, 932, the court said:

" 'It is elementary law that, when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained. This form of action is comprehensive in its reach and scope, and though the form of proceeding is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored by the courts. It lies for money paid under protest, or obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid. Where the defendant is proved to have in his hands the money of the plaintiff which, ex aequo et bono, he ought to refund, the law conclusively presumes that he has promised to do so' — citing *Mayo v. Purington*, 113 Me. 452, 455, 94 Atl. 935.

"To the same effect are *Gaines v. Miller.* 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466; *Taylor v. Currey,* 192 Ill. App. 502; *Early v. Atchison, T. & S. F. Ry. Co.,* 167 Mo. App. 252, 149 S. W. 1170; *Cullen v. Sea Board Air Line,* 63 Fla. 122, 58 South, 182; *Knight v. Forbes,* 19 Ga. App. 320, 91 S. E. 445, in which the court said that such an action needs for its support no actual contractual relation, for the law will imply a quasi contractual relation to uphold it whenever the circumstances so require."

Judge Denman at a later date, speaking for this Court in *Taylor v. Merrill,* 104 F. 2d. 710, said:

"It is elementary that the basis of the action for money had and received, is that it is held by the defendant when in equity and good conscience it belongs to the plaintiff."

Typical statements of other Circuits in application of the principles of the case at Bar are as follows:

Judge Jones, speaking for the Third Circuit in *Bailis v. Reconstruction Finance Corporation,* 128 F. 2d 857, said:

"Unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to do or to forbear doing a particular thing. A quasi-contract does not arise out of a promise. See Restatement, Contracts (1932) §5. In fact it is imposed in direct opposition to the intention of the party charged therewith. Such contracts are the means which the law has adopted to raise up obligations in order to promote justice. See *Hertzog v. Hertzog,* 29 Pa. 465, 468; I Williston on Contracts (rev. ed. 1936) §3, pp. 7-10. Thus, one who is unjustly enriched at the expense of another may be required for that reason

alone to make restitution. Restatement, Restitution (1937) §1."

Judge Clark, speaking for the Second Circuit in *Matarese v. Moore-McCormick Lines,* 158 F. 2d. 631, said:

> "The doctrine of unjust enrichment or recovery in quasi-contract obviously does not deal with situations in which the party to be charged has by word or deed legally consented to assume a duty toward the party seeking to charge him. Instead, it applies to situations where as a matter of fact there is no legal contract, but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another. *Miller v. Schloss,* 218 N. Y. 400, 407, 113 N. E. 337; *Byxbie v. Wood,* 24 N. Y. 607, 610; *White v. Continental Nat. Bank,* 64 N. Y. 316, 21 Am. Rep. 612; *Oneida County v. First Citizens Bank & Trfust Co. of Utica,* 264 App. Div. 212, 35 N.Y.S. 2d 782; 1 Williston on ontracts, Rev. Ed. 1936; §3, p. 9. Where this is true the courts impose a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong. Restatement, Restitution, 1937, § 1(a); *Pullman's Palace Car Co. v. Central Transp. Co.,* 171 U. S. 138, 152, 18 S. Ct. 808, 43 L. Ed. 108."

The right to restitution by reason of unjust enrichment is set forth in *Restatement of Restitution,* Chapter 1, Section 1, succinctly as follows:

> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

Finally, the Supreme Court of Washington, the juris-

diction in which this case arose, has pronounced the applicable principles in the following language:

Bill v. Gattavara, 209 P. 2d. 457, 34 Wash. 2d. 645.

> "A person should not be permitted unjustly to enrich himself at the expense of another. The obligation to do justice rests upon all persons; and if one obtains the property of another, or the proceeds of the property of another, without a right to do so, equity can, in a proper case, compel restitution or compensation. It is not necessary in order to create an obligation to make restitution or to compensate, that the party unjustly enriched should have been guilty of any tortious or fraudulent act. The question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?

An examination of the cases reveals that the general principles announced have been applied to all conceivable factual situations, and the remedy by way of restitution for unjust enrichment is just as broad as any situation which gives rise to its application.

2. PETITIONER IS NOT BARRED FROM EQUITABLE RELIEF.

The only suggestion in the record which would bar the petitioner from obtaining restitution in this matter is the conclusion of the Referee that since the petitioner had been held liable for a wrongful and willful conversion that it does not come into court with clean hands and should be barred from any equitable relief (R. 49). The opinion of the Supreme Court of the State of Washington which

is made a part of the Agreed Statement of Facts by reference (R. 15), by way of dicta commented that the conversion was not an unintentional or inadvertent conversion (R. 36). It is clear from the opinion of the Supreme Court, however, that the Scott Publishing Company did no more than take physical possession of property which it had every right to believe that it had purchased. That it later discovered that conflicting claims were made to the property in question, and that it chose to keep possession in dependence upon the assumption that its seller, Reed, had made a valid sale to it, certainly does not establish that it was guilty of such conduct that it does not have "clean hands," certainly not to the extent that it should be denied restitution for a subsequent unjust enrichment at its expense which has occurred some years later and which arises out of an entirely different set of circumstances.

In any event,, the doctrine of "clean hands" has no applicability unless there is some reasonable connection between the conduct which disqualifes the litigant, and the transaction which would otherwise give it a right to equitable relief. As is stated in 19 *Am. Jur. Equity,* Section 473, Page 327:

> "The applicability of the maxim, 'he who comes into equity must come with clean hands,' depends upon the connection between the complainant's iniquitous acts and the defendant's conduct which the com-

> plainant relies upon as establishing his cause of action. Relief is not to be denied because of general iniquitous conduct on the part of the complainant or because of the latter's wrongdoing in the course of a transaction between him and a third person. In other words, the maxim may not be invoked by reason of acts which are not shown to have been connected with the transaction giving rise to the suit or otherwise to have been related to the defendant or anything in which he was interested. Where inequitable conduct is shown, the resulting disqualification extends only to the enforcement or equities which are founded upon the matter or transaction which the conduct involved. The question to be resolved is whether the complainant's wrongful conduct is connected with, or related to, the dispute between the complainant and the defendant and not whether the complainant has been guilty of wrongdoing from which he has benefited.
>
> "The courts apply the maxim, 'not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice."

If the Scott Publishing Company was guilty of a conversion, it was a conversion accomplished pursuant to a purchase of the property from the man who represented himself to be the owner thereof, followed by the taking of physical possession of the property on June 12, 1949. This was followed on June 15, 1949 by a refusal of the defendant to release the property to those representing Mid-Columbia Publishers who were claiming that it had the right to possession of the property. Shall such conduct in June of 1949 be held to disqualify the Scott Publishing Company from the recovery of a sum paid to a Trustee in

bankruptcy some *years* later, and which has resulted in an unjust enrichment of the bankrupt estate? Although the acts in June of 1949 led to litigation out of which arose circumstances beyond the control of appellant resulting in the unjust enrichment of the bankrupt estate, that is not a sufficient connection to disqualify the appellant from asking equitable relief in these proceedings.

3. THE JUDGMENTS OF THE STATE COURTS ARE NOT RES-ADJUDICATA OF THE RIGHTS OF PETITIONER.

4. THESE PROCEEDINGS DO NOT INVOLVE MATTERS WHICH COULD AND SHOULD HAVE BEEN ADJUDICATED IN THE STATE COURTS.

5. THESE PROCEEDINGS ARE NOT COLLATERAL ATTACKS ON THE JUDGMENT OF THE STATE COURT.

The foregoing three points upon appeal will be discussed at the same time since they involve essentially the same problem.

The question of whether or not the decision and judgment of the courts of the State of Washington constitute a bar to the relief which petitioner seeks or whether this proceeding is a collateral attack upon those judgments, or whether or not these matters should and could have been litigated in the State court proceedings are all facets of the same problem—that is, does the doctrine of *res*

adjudicata or *estoppel by judgment* bar this petitioner from relief to which it would otherwise be clearly entitled?

It is submitted by the appellant that the proceedings in the State court are not decisive of its right to the return of the $8,550.00 which it paid, thus unjustly enriching the bankrupt estate. It is further its contention on appeal that its clear right to restitution, as a mater of simple justice, should, in any event, override any considerations of policy which support the principle of *res adjudicata.* It is the position of the appellant that when a manifest injustice exists, courts should redress that injustice and provide a remedy, and not stand by helplessly and confess that their hands have been bound by a restrictive doctrine which prevents and does not promote the doing of justice between the parties.

Let us first consider the facts which allegedly support the application of *res adjudicata* to this controversy.

The State court proceedings out of which the judgment arose, and which is alleged to constitute a bar to these proceedings, was an action brought by the Trustee in bankruptcy against the Scott Publishing Company for conversion of physical property (R. 13). In the course of that action, an issue arose between the parties over the proper measure of damage in event a conversion was established. The ruling of the trial court to the effect that the mortgage indebtedness should be deducted from

the market value of any converted property in determining th measuse of damage obviated the necessity of offering evidence upon that issue (R. 14). Accordingly, the question of whether or not Scott Publishing Company had assumed and agreed to pay and was paying the mortgage indebtedness *was not litigated.* In these proceedings the petitioner is seeking the recovery of monies by way of restitution after having paid same as a result of the reversal of the trial court by the appellate court in the State of Washington. The issue of assumption and payment of the mortgage indebtedness by Scott Publishing Company is pleaded and directly involved in these proceedings; evidence was offered that such assumption and payment was and is the fact, and that is not controverted by the Trustee; the Trustee simply claims that evidence on such an issue was known to Scott Publishing Company and *could have been presented and litigated* in the State court proceedings (R. 17).

In the first place, it is submitted that such an issue could not have been litigated in the State court proceedings because the ruling of the trial court eliminated the necessity of offering any evidence on the point, and, indeed, if it had been offered after such a favorable ruling, it would properly have been rejected as being irrelevant and immaterial. Nevertheless, even if it be said that it *could have been litigated,* that does not constitute *res ad-*

judicata or estoppel by judgment against the petitioner in these proceedings.

The distinction between *res adjudicata* and *estoppel by judgment* has been authoritatively laid down by the Supreme Court of the United States in *Commissioner v. Sunnen,* 333 U. S. 591, 92 L. Ed. 898, 68 S. Ct. 715. In that case, the opinion of Mr. Justice Murphy stated:

> "It is first necessary to understand something of the recognized meaning and scope of res judicata, a doctrine judicial in origin. The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rules provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. Sac County,* 94 U. S. 351, 352, 24 L. ed, 195, 197. The judgment puts an end to the cause of action which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See von Moschzisker, 'Res Judicata,' 38 Yale L. J. 299, Am. L. Inst. Restatement, Judgments, §47, 48.
>
> "But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to

those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. Sac County, supra* (94 U. S. 353, L. ed. 198). And see *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Southern P. R. Co. v. United States*, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 S. Ct. 18; *Mercoid Corp. v. Mid-Continent Invest. Co.*, 320 U. S. 661, 671, 88 L. ed. 376, 384, 64 S. Ct. 268. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Am. L. Inst. Restatement, Judgments, § § 68, 69. 70; Scott, "Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1."

The *Sunnen case, supra*, was cited with approval by Judge Bone of this court in *Gensinger v. Commissioner*, 208 F. 2d 576. The doctrine of the *Sunnen case, supra*, has been followed in nearly all of the Circuit courts. A typical example of the application of the principle is found in *Syms v. McRitchie*, a decision of the United States Court of Appeals, Fifth Circuit, 187 F. 2d, 915, in which Judge Strum said:

"The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand, or upon a different claim or demand. In the

former case, a judgment upon the merits is an absolute bar to a subsequent action, not only with respect to matters determined in the former suit, but also with respect to every matter which might have been litigated to sustain or defeat the claim. In the latter case, the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the prior action. *Cromwell v. Sac County,* 94 U. S. 351, 24 L. ed. 195; *Kelliher v. Stone & Webster,* 5 Cir., 75 F. 2d. 331; *Troxell v. Delaware, L. & W. R. R. Co.,* 227 U. S. 434, 33 S. Ct. 274, 57 L. ed. 586; *Tait v. Western Md. Ry. Co.,* 289 U. S. 620, 53 S. Ct. 706, 77 L. ed. 1405.

"It is of the essence of estoppel by judgement that it be certain that the precise issue raised in the second suit was determined by the former judgment. *Commissioner of Internal Revenue v. Sunnen,* 333 U. S. 591, 68 S. Ct. 715, 92 L. ed. 898. If there be any uncertainty in the record as to whether it was so determined, the whole subject matter of the second action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point to have been involved and determined in the former action. *De Sollar v. Hanscome,* 158 U. S. 216, 15 S. Ct. 816, 39 L. ed. 956."

In *Commissioner v. Texas-Empire Pipe Line Co.,* 176 F. 2d 523, a decision of the United States Courts of Appeal for the Tenth Circuit, the opinion of Judge Murrah follows the principles laid down in the *Sunnen case, supra.*

It is apparent that we have in these proceedings an action in which the exact point was not litigated in the State court proceedings. The question here involved, although between the same parties, does not arise "upon

the same claim or demand" as in the State court proceedings, but "upon a different claim or demand." In such a situation, the judgment of the courts of the State of Washington is not a bar to these proceedings, even if it could be said that the point *might* have been litigated therein.

The Supreme Court of the United States, in *Oklahoma v. Texas,* 256 U. S. 70, 65 L. ed. 831, 41 S. Ct. 420, stated:

> " . . . But we concede that, in a subsequent suit upon a different cause of action, the question whether the matter decided on the former occasion was within the issues then proper to be decided, or was presented and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative, the matter is not res judicata."

Mr. Justice Douglas, speaking for the Supreme Court in *U. S. v. International Building Company,* 345 U. S. 502, 97 L. ed 1182, 72 S. Ct. 897, quoted from *Cromwell v. County of Sac,* 94 U. S. 351, as follows:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and deter-

> mined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The cause of action asserted by the appellant in these proceedings has never been previously litigated. It is not barred from the proceedings by reason of *res adjudicata*, nor is petitioner estopped by judgment, nor is the proceeding a collateral attack upon a judgment.

The District Judge in his memorandum cited the following cases in support of his conclusion that the doctrine of estoppel by judgment was applicable:

> *Partmar Corp. v. Paramount Picture Theatre Corp.*, 347 U. S. 89;
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> *Heiser v. Woodruff*, 327 U. S. 726;
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> *Baltimore S & S Co. v. Phillips*, 274 U. S. 316;
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> *Reed v. Allen*, 286 U. S. 191;
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> *Deposit Bank v. Frankfort*, 191 U. S. 499;
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> *Lester v. National Broadcasting Company, Inc.*, Court of Appeals, Ninth Circuit, 217 F. 2d. 399 (R. 50-51).

In each of the cases the identical cause of action which had been previously litigated between the identical parties was again brought, and necessarily the courts concluded that the second proceeding was barred by reason of the entry of judgment in the first. Here we do not have the same cause of action involved in these proceedings as in the State court proceedings. In fact, no cause of action at all was being asserted by Scott Publishing Company

in the State court proceedings. The distinction appears quite clearly in the case of *Baltimore S. & S. Co. v. Phillips, supra.* An action was there brought by an infant against the United States and a steamship company for injuries sustained in an accident by the infant while employed on a vessel. A recovery was made in the Federal District Court. Subsequently, the same plaintiff brought an action arising out of the same accident against the same company for other items of damage. The court said:

> "The effect of a judgment or decree as res adjudicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered. *Cromwell v. Sac County,* 94 U. S. 351-353, 24 L. ed, 195, 197, 198; *United States v. Moser,* 266 U. S. 236, 241, 69 L. ed. 262, 264, 45, Sup. Ct. Rep. 66. There is some confusion in the decisions as to whether the present case should fall within the first or the second branch of the rule, but we are of the opinion that the great weight of authority, both in respect of the number of decisions and upon reason, sustains the view that the facts here gave rise to a single cause of action for damages and that the first branch of the rule applies."

In the case at bar the second branch of the foregoing rule would apply, and the petitioner is not foreclosed from having its action for restitution determined upon its merits.

The four generally recognized requirements for the application of the doctrine of *res adjudicata* are set forth in the case of *Walsh v. Wolff*, 201 P. 2d. 215, 32 Wash. 2d. 285, as follows:

> "To make a judgment *res adjudicata* in a subsequent action there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made."

There is no identity of either subject matter or cause of action in this proceeding which would render the doctrine of *res adjudicata* applicable.

Finally, consideration should be given to the underlying policy for applying the doctrine of *res adjudicata* to any case. Those principles are set forth in 50 *C.J.S.*, Judgments, Section 592, Page 11, as follows:

> "Res judicata is a rule of universal law pervading every well regulated system of jurisprudence, and is put on two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation—interest republicae ut sit finis litium; the other, the hardship on the individual that he should be vexed twice for the same cause—nemo debet bis vexari pro eadem causa. The doctrine applies and treats the final entire subject of

> the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided.
>
> "The doctrine should receive a liberal construction, and should be maintained and applied without technical restrictions. On the other hand, the doctrine should not be applied so rigidly as to defeat the end of justice."

It s clear that the Trustee in bankruptcy is not being vexed twice by the same claim. The Trustee in bankruptcy has never previously had to defend this claim, nor other than in these proceedings. It is difficult to see that public policy would require an end to his litigation when it has actually never been previously decided. On the other hand, we have a situation in which an injustice will be done if the doctrine of *res adjudicata* or estoppel by judgment is applied in this case. Some courts have not hesitated to override the doctrine when its application would defeat rather than promote the ends of justice. In *Mercoid Corporation v. Mid-Continent Investment Company,* 320 U. S. 661, 88 L. ed. 376, the court, speaking through Mr. Justice Douglas, did not hesitate to cast aside *res adjudicata* in a case in which its application would have promoted injustice rather than to accomplish the purpose for which *res adjudicata* was designed. A comment note follows that case, and is cited at 88 L. ed. 389. The comment states:

> "It should be observed that in most cases recognizing on grounds of public policy, an exception to the rules of res adjudicata, the controversy or issue which under the general rules would have been concluded by a former judgment has not been actually litigated and determined by such judgment."

This case definitely falls within that principle.

Other cases in which the courts did not hesitate to criticize the curious result which *res adjudicata* would produce are *Adams v. Pearson*, 104 N. E. 2d 267 (Ill.), and *re di Carlo*, 44 P. 2d 562, 3 Calif. 2d 225. In *Spilker v. Hankin*, 188 F. 2d 35, a decision of the United States Court of Appeals, Disrict of Columbia Circuit, the action involved a suit by an attorney to recover upon certain notes given to him in payment of services. Certain equitable defenses, such as coercion, duress, and want of consideration were interposed by way of defense, and it was claimed that such could not be raised because the same had been previously litigated between the parties in a suit on another note. The court held that all of the elements of *res adjudicata* were present, but that the overriding policy of carefully scrutinizing contracts between an attorney and client necessitated a holding that *res adjudicata* should not properly be applied. The court there said:

> "The doctrine of res adjudicata is but the technical formulation of the "Public policy * * * that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered for-

ever settled as between the parties. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U. S. 522, 525, 51 S. Ct. 517, 518, 75 L. ed. 1244. This policy has long been a tenet of the common law, and even finds expression in the Constitution of the United Sates, in the full faith and credit clause. Experience has taught that as a general rule there is no reason why the doctrine of res adjudicata 'should not apply in every case where one voluntarily appears, presents his case and is fully heard * * * .'"

"But rules and policies such as these must be weighed against competing necessities: situations may arise which call for exceptions. Recently this court decided a case involving such a situation, and held that "Where the application of the judicial doctrine *res adjudicata* would be inconsistent with the method devised by Congress the doctrine will not be enforced by the courts. *Kalb v. Feuerstein*, 1940, 308 U. S. 433, 444, 60 S. Ct. 343, 84 L. Ed. 370. It is for this reason we hold against the contention of petitioners, and not because of lack of any of the elements which usually make out a case for the application of *res judicata*. The doctrine is not to be used where the circumstances create a semblance of conditions for its application but to apply it would submerge the plan of Congress for the administration and enforcement of its policy." *Denver Building & Construction Trades Council v. N. L. R. B.*, 87 U. S. App. D. C. 293, 186 F. 2d 326, 332.

"Other policies, not embodied in a congressional mandate, have compelled the same result. For example, while the courts of this country, as a general rule, have given res judicata effect to judgments of foreign countries, there have been situations where American courts have refused such recognition for policy reasons. Decisions of this sort demonstrate that res judicata, as the embodiment of a public policy, must,

> at times, be weighed against competing interests, and must, on occasion, yield to other policies."

In this case, *res adjudicata* or judgment by estoppel should not be used to foster an unjust result.

CONCLUSION

In conclusion, the appellant submits that it is entitled to restitution of the $8,550.00 which it paid to the Trustee in bankruptcy. It has had to pay that sum twice. The Trusee in bankruptcy has been enriched to the extent of $8,550.00, and the bankrupt estate has received an asset for distribution to which it was not entitled, and which it never expected to receive. The administration of the bankrupt funds is a function of the court. A court (perhaps even more than a private institution) should be most zealous in seeing that such an arm of the court does not receive funds to which it is not in jusitce entitled at the expense of another. The doctrine of *res adjudicata* or estoppel by judgment has no application to these proceedings for the reasons set forth. The District Court and the Referee in Bankruptcy should be reversed with instructions that the Trustee in Bankruptcy be ordered to disburse the sum of $8,550.00 to the appellant from funds of the bankrupt estate.

Respectfully submitted,

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